No. 14-8913

In The Supreme Court of the United States

SAUL MOLINA-MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 16, 2015
Certiorari Granted October 1, 2015

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TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Indictment	12
No Objections of the United States to Presentence Report	14
Defendant's Objection to the Presentence Investigation Report	16
Transcript – Call for Sentencing, January 14, 2013	19
Transcript – Sentencing Hearing, March 14, 2013	24
Judgment of the United States District Court for the Southern District of Texas	36
Opinion of the United States Court of Appeals for the Fifth Circuit	45
Judgment of the United States Court of Appeals for the Fifth Circuit	50
Order of the Supreme Court of the United States granting certiorari and leave to proceed *in forma pauperis*, October 1, 2015	52

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff,	Criminal Case No. 1:12-00848
v.	Relevant Docket Entries
SAUL MOLINA-MARTINEZ, Defendant.	

Date filed	No.	Docket Text
09/01/2012	1	COMPLAINT as to Saul Molina-Martinez (1), filed. (bcampos,) (avleal,). [1:12-mj-00867] (Entered: 09/04/2012)
09/01/2012	2	AO 257 Information Sheet as to Saul Molina-Martinez; arrested on 8/31/12, filed.(bcampos,) (rnieto,). (Additional attachment(s) added on 9/4/2012: # 1 Unredacted attachment) (rnieto). [1:12-mj-00867] (Entered: 09/04/2012)
09/04/2012	3	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as to Saul Molina-Martinez (Signed by Magistrate Judge Ronald G. Morgan) Parties notified. (sbejarano,) [1:12-mj-00867] (Entered: 09/04/2012)
09/25/2012	6	INDICTMENT (The original indictment with the signature of the grand jury foreperson is on file under seal with

	the clerk) as to Saul Molina-Martinez (1) count(s) 1, filed. (sbejaranoadi,) [*sic*] Modified on 9/27/2012 (sbejarano,). (Entered: 09/26/2012).
10/03/2012	Minute Entry for proceedings held before Magistrate Judge Ronald G. Morgan: ARRAIGNMENT as to Saul Molina-Martinez held on 10/3/2012. Deft waives reading of the Indictment and enters a Plea of NOT GUILTY. Scheduling Order dates orally given to all parties. Guilty Plea scheduled. Deft remanded to the custody of the U.S. Marshal. Appearances: David Lindenmuth standing in for Bill Hagen, AUSA; Reynaldo Cantu f/dft. (USPO: Celia Arrezola) (ERO: Juanita Tabares) (Interpreter: Sandra Cortez) (DUSM: Matthew Lesche) (bvasquez) [9:21-9:31 AM] (Entered: 10/03/2012)
10/11/2012	Minute Entry for proceedings held before Magistrate Judge Felix Recio: RE-ARRAIGNMENT held on 10/11/2012; Pursuant to General Order 05-001/002, Plea as to Saul Molina-Martinez (1) Guilty Count 1 before a United States Magistrate Judge; Consent to Administration of Guilty Plea and Fed.R.Crim.P. 11 Allocution by United States Magistrate Judge filed; Defendant placed under oath. The Court was informed that the defendant was offered a Plea Agreement and after discussions with the defendant, the plea agreement

		was rejected. The Court inquires if the defendant has been advised of the possible immigration consequences resulting from this plea, pursuant to Padilla v. Kentucky, 130 S.Ct.1473 (2010); Defendant enters a PLEA OF GUILTY to the Indictment; NO PLEA AGREEMENT filed; PSI and Sentencing dates orally given to all parties; Terminate other settings and motion for this defendant. Sentencing set for 1/14/2013 at 08:30 AM before Judge Andrew S. Hanen. Defendant remanded to the custody of the US Marshal. Appearances: AUSA A Cano and R Cantu f/dft,. US Probation – B, US Marshal – B. (ERO: D Ahumada) (Interpreter: V Reyes) (sgarcia,) (09:13-09:53am) (Entered: 10/11/2012)
10/11/2012	12	ORDER for Presentence Investigation and Disclosure & Sentencing Dates as to Saul Molina-Martinez. PSI Completion due by 11/26/2012 Objection to PSI due by 12/10/2012 Final PSI due by 12/24/2012 Sentencing set for 1/14/2013 at 08:30 AM in Courtroom 6 before Judge Andrew S. Hanen (Signed by Magistrate Judge Felix Recio) Parties notified. (bcampos,) (Entered: 10/11/2012)
12/07/2012	14	NOTICE of No Objections of the United States to the PSR by USA as to Saul Molina-Martinez, filed. (Hagen, William) (Entered: 12/07/2012)

12/19/2012	15	OBJECTION by Saul Molina-Martinez *to the PSR*, filed. (Attachments: # 1 Proposed Order) (Cantu, Reynaldo) (Entered: 12/19/2012)
12/20/2012	16	Final Presentence Investigation Report (Sealed) as to Saul Molina-Martinez, filed. (Attachments: # 1 attpsr1, # 2 attpsr2) (msosa,) (Entered: 12/20/2012)
12/20/2012	17	Confidential Sentencing Recommendation (Sealed) regarding Saul Molina-Martinez, filed. (msosa,) (Entered: 12/20/2012)
12/20/2012	18	Sealed Addendum to 16 Final Presentence Investigation Report (Sealed) as to Saul Molina-Martinez, filed. (msosa,) (Entered: 12/20/2012)
01/14/2013		Minute Entry for proceedings held before Judge Andrew S. Hanen: Appearances: B.Hagen, AUSA; R.Cantu, AFPD f/deft; S. Barrios, USPO (Duty); (Court Reporter: Barbara Barnard); (Interpreter: S.Cortez)(08:37-08:39) SENTENCING HELD in PART on 1/14/2013 as to Saul Molina-Martinez. Deft sworn in. No objection from Govt/Deft to report &recommendation, Court accepts Magistrate's plea and adjudicates Deft Guilty. Defts ORAL motion for continuance w/o objections-GRANTED. Sentencing continued to 03/04/13 at 8:30 am. Deft remanded to the custody of USM., filed. (csustaeta,) (Entered: 01/14/2013)

03/04/2013	Minute Entry for proceedings held before Judge Andrew S. Hanen: Appearances: B. Hagen, AUSA; R. Cantu, AFPD f/deft; M. Garcia, USPO (duty); (Court Reporter: Barbara Barnard); (Interpreter: K. Pena) (10:19-10:21) SENTENCING HELD in PART on 3/4/2013 as to Saul Molina-Martinez. Defts oral motion for continuance w/o objections-GRANTED. Sentencing continued to 03/14/13 at 8:30 am. Deft remanded to the custody of USM., filed. (csustaeta,) (Entered: 03/04/2013)
03/14/2013	Minute Entry for proceedings held before Judge Andrew S. Hanen: Appearances: B. Hagen, AUSA; R. Cantu, AFPD f/deft; S. Espinosa, USO (duty); (Court Reporter: Barbara Barnard); (Interpreter: S.Cortez) (09:25-09:41) SENTENCING held on 3/14/2013 as to Saul Molina-Martinez. (P/G to Ct.1 on 10/11/12) Deft sworn in. 15 Defts objections-OVERRULED. Govts Exhibit #1 admitted. Court adopts PSI findings. SENTENCE: Saul Molina-Martinez (1), Count(s) 1, CBOP: 77 months; SRT: 3 yrs w/o supervision; SA: $100 remitted, Fine waived. Deft shall cooperate in collection of DNA sample. Deft not to re-enter U. S. Illegally. Deft remanded to the custody of USM., filed. (csustaeta,) (Entered: 03/14/2013)

03/18/2013	22	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit by Saul Molina-Martinez, filed. (Cantu, Reynaldo) (Entered: 03/18/2013)
03/22/2013	26	JUDGMENT as to Saul Molina-Martinez (Signed by Judge Andrew S. Hanen) Parties notified. (dnoriega,) (Entered: 03/22/2013)
03/22/2013	27	Statement of Reasons (Sealed) as to Saul Molina-Martinez, filed. (Entered: 03/22/2013)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	5th Cir. No. 13-40324
v.	D.C. No. No. 1:12-CR-848-1
SAUL MOLINA-MARTINEZ, Defendant-Appellant.	Relevant Docket Entries

Date	Docket Text
03/21/2013	DIRECT CRIMINAL CASE docketed. NOA filed by Appellant Mr. Saul Molina-Martinez [13-40324] (BCL)
08/01/2013	ANDERS BRIEF DECLARED MOOT AS A MERITS BRIEF HAS BEEN FILED.
	ANDERS BRIEF FILED by Mr. Saul Molina-Martinez. Date of service: 08/01/2013 via email – Attorney for Appellants: Crooks, Ling, Meyers; Attorney for Appellee: Gowie [13-40324] REVIEWED AND/OR EDITED. # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Paper Copies of Brief due on 08/12/2013 for Appellant Saul Molina-Martinez. [13-40324] (Timothy William Crooks)
08/01/2013	MOTION filed by Attorney Mr. Timothy William Crooks for Appellant Mr. Saul Molina-Martinez *in accordance with Anders v. California 386 U.S. 738 (1967)* to withdraw as counsel [7425447-2]. Date

of Service: 08/01/2013 via email – Attorney for Appellants: Crooks, Ling, Meyers; Attorney for Appellee: Gowie [13-40324] (Timothy William Crooks)

09/25/2013 PRO SE RESPONSE filed by Appellant Mr. Saul Molina-Martinez to the motion to withdraw as counsel filed by Mr. Timothy William Crooks in 13-40324 [7425447-2] Anders Response deadline satisfied.. Date of Service: 09/19/2013 [13-40324] (AS)

01/14/2014 COURT ORDER denying motion to withdraw as counsel filed by Mr. Timothy William Crooks, directing counsel to file a supplemental Anders brief or a brief on the merits addressing whether the criminal history category was accurately calculated and any other non-frivolous matters (IN DETAIL) [7425447-2] A/Pet's Brief due on 02/13/2014 for Appellant Saul Molina-Martinez. Judge(s): CH. [13-40324] (ADB)

01/31/2014 APPELLANT'S BRIEF FILED by Mr. Saul Molina-Martinez. Date of service: 01/31/2014 via email -Attorney for Appellants: Crooks, Ling, Meyers; Attorney for Appellee: Gowie [13-40324] REVIEWED AND/OR EDITED. # of Copies Provided: 0. A/Pet's Brief deadline satisfied. Appellee's Brief due on 03/05/2014 for Appellee United States of America. Paper Copies of Brief due on 02/10/2014 for Appellant Saul Molina-Martinez [13-40324] (Timothy William Crooks)

04/28/2014 APPELLEE'S BRIEF FILED by Appellee USA. Date of service: 04/28/2014 via email – Attorney for Appellants: Crooks, Ling, Meyers; Attorney for Appellees: Gowie, Offenhauser [13-40324] REVIEWED AND/OR EDITED. # of Copies Provided: 0. E/Res's Brief deadline satisfied. Reply Brief due on 05/15/2014 for Appellant Saul Molina-Martinez. Paper Copies of Brief due on 05/05/2014 for Appellee United States of America. [13-40324] (Paula Camille Offenhauser)

05/09/2014 APPELLANT'S REPLY BRIEF FILED by Mr. Saul Molina-Martinez Date of service: 05/09/2014 via email - Attorney for Appellants: Crooks, Meyers; Attorney for Appellees: Gowie, Offenhauser [13-40324] REVIEW AND/OR EDITED.

# of Copies Provided: 0. Reply Brief deadline satisfied. Paper Copies of Brief due deadline satisfied. [13-40324] (CAG) (Timothy William Crooks)

10/23/2014 SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellee USA Date of Service: 10/23/2014 via email – Attorney for Appellants: Crooks, Ling, Meyers; Attorney for Appellees: Gowie, Kalluri, Offenhauser [13-40324] (Anna Elizabeth Kalluri)

10/27/2014 ORAL ARGUMENT HEARD before Judges Stewart, Jones, Higginson. Arguing Person Information Updated for: Timothy William Crooks arguing for Appellant Saul Molina-Martinez; Arguing Person

Information Updated for: Anna Elizabeth Kalluri arguing for Appellee United States of America [13-40324] (SME)

11/04/2014 SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellee USA Date of Service: 11/04/2014 via email – Attorney for Appellants: Crooks, Ling, Meyers; Attorney for Appellees: Gowie, Kalluri, Offenhauser [13-40324] (Anna Elizabeth Kalluri)

11/04/2014 RESPONSE filed by Appellant Mr. Saul Molina-Martinez to the 28j letter filed by Appellee USA in 13-40324 [7769122-2] Date of Service: 11/04/2014 via email – Attorney for Appellants: Crooks, Meyers; Attorney for Appellees: Gowie, Kalluri, Offenhauser [13-40324] (Timothy William Crooks)

11/06/2014 SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellant Mr. Saul Molina-Martinez Date of Service: 11/06/2014 via email – Attorney for Appellants: Crooks, Meyers; Attorney for Appellees: Gowie, Kalluri, Offenhauser [13-40324] (Timothy William Crooks)

12/17/2014 UNPUBLISHED OPINION FILED. [13-40324 Affirmed] Judge: CES , Judge: EHJ , Judge: SAH Mandate pull date is 01/07/2015 for Appellant Saul Molina-Martinez [13-40324] (RMF)

12/17/2014 JUDGMENT ENTERED AND FILED. [13-40324] (RMF)

01/08/2015 MANDATE ISSUED. Mandate pull date satisfied. [13-40324] (CAG)

03/20/2015 SUPREME COURT NOTICE that petition for writ of certiorari [7869127-2] was filed by Appellant Mr. Saul Molina-Martinez on 03/16/2015. Supreme Court Number: 14-8913. [13-40324] (LGL)

10/02/2015 SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Mr. Saul Molina-Martinez in 13-40324 on 10/01/2015. [8026075-1] [13-40324](CAV)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
	§	**CRIMINAL NO.**
vs	§	**B-12-848**
SAUL MOLINA-MARTINEZ	§	

INDICTMENT

(Filed Sep. 25, 2012)

THE GRAND JURY CHARGES:

On or about August 31, 2012, in the Southern District of Texas and within the jurisdiction of the Court, Defendant,

SAUL MOLINA-MARTINEZ,

an alien who had previously been denied admission, excluded, deported, and removed, after having been convicted of an aggravated felony, knowingly and unlawfully was present in the United States having been found in Kenedy County, Texas, the said defendant having not obtained consent to reapply for admission into the United States from the Attorney General of the United States and Secretary of Homeland Security, the successor, pursuant to Title 6, United States Code, Sections 202(3), 202(4), and 557

In violation of Title 8, United States Code, Section 1326(a) and 1326(b).

A TRUE BILL:

_____

FOREPERSON OF
THE GRAND JURY

KENNETH MAGIDSON
UNITED STATES ATTORNEY

/s/ Bill Hagen
William Hagen
Assistant United
States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
	§	Criminal No.
vs	§	B-12-848-1
SAUL MOLINA-MARTINEZ	§	

NO OBJECTIONS OF THE UNITED STATES TO PRESENTENCE REPORT

(Filed Dec. 7, 2012)

COMES NOW the United States Attorney for the Southern District of Texas by and through its Assistant United States Attorney and files, pursuant to Federal Sentencing Guidelines Section 6A1.3, no objections to the Presentence Report.

Respectfully submitted,

KENNETH MAGIDSON
UNITED STATES ATTORNEY

s/ William F. Hagen

WILLIAM F. HAGEN
Assistant United
States Attorney
Fed. Bar No. 28261
TX Bar No. 08688600
600 E. Harrison St, #201
Brownsville, TX 78520
Tel: (956) 548-2554;
Fax: (956) 548-2711

CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of December, 2012, the No Objections of the United States to Presentence Report was electronically filed. A copy will be electronically sent to Reynaldo Cantu, Assistant Federal Public Defender, Brownsville, Texas. The original was hand delivered to the U.S. Probation Office, Brownsville, Texas.

s/ William F. Hagen
WILLIAM F. HAGEN
Assistant United
States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
	§	CR. NO. B-12-848
V	§	
SAUL MOLINA-MARTINEZ	§	

DEFENDANT'S OBJECTION TO THE PRESENTENCE INVESTIGATION REPORT

(Filed Dec. 19, 2012)

Comes now, **SAUL MOLINA-MARTINEZ**, defendant, and makes the following objection to the Presentence Investigation Report (PSR) as follows:

I.

Defendant objects to the 16 level enhancement in paragraph14. The Tennessee statutes section 39-14-401, 402 and 403 definitions are broader than the Model Penal Code, *US v. Herrera-Montes*, 490 F3d 390 (5thCir 2007).

WHEREFORE PREMISES CONSIDERED, defendant prays the Court to sustain this objection to the presentence investigation report.

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas.
Texas State Bar No. 14003750
Southern District of
Texas No. 3233

By: /s/ Reynaldo S. Cantu
REYNALDO S. CANTU
Assistant Federal
Public Defender
Attorney in Charge
Texas State Bar No. 03767500
Southern District of
Texas No. 1900
600 E. Harrison Street, #102
Brownsville, Texas 78520
Telephone: (956) 548-2573
Fax: (956) 548-2674

CERTIFICATE OF SERVICE

I, Reynaldo S. Cantu, certify that on 19 day of December, 2012, a copy of the foregoing **Defendant's Objection to the Presentence Investigation Report** was served by Notification of Electronic Filing to the office of United States Probation Officer Samantha Espinosa, 600 E. Harrison Street, #103,

Brownsville, Texas 78520, and was served by Notification of Electronic Filing to Assistant United States Attorney William F. Hagen, 600 E. Harrison Street, #201, Brownsville, Texas 78520.

/s/ Reynaldo S. Cantu
REYNALDO S. CANTU
Assistant Federal
Public Defender

CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with Assistant United States Attorney William F. Hagen concerning this objection, and he informed me that the government is opposed to said objection.

/s/ Reynaldo S. Cantu
REYNALDO S. CANTU
Assistant Federal
Public Defender

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA VS. SAUL MOLINA-MARTINEZ	CRIMINAL ACTION NO. B-12-848

CALL FOR SENTENCING
BEFORE THE HONORABLE ANDREW S. HANEN
JANUARY 14, 2013
VOLUME 1

APPEARANCES:

For the Plaintiff:
MR. WILLIAM HAGEN
Assistant United States Attorney
Brownsville, Texas

For the Defendant:
MR. REYNALDO CANTU
Assistant U.S. Public Defender
Brownsville, Texas

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General Order 94-15, United States District Court, Southern District of Texas.

Transcribed by:
BARBARA BARNARD
Official Court Reporter
600 E. Harrison, Box 301
Brownsville, Texas 78520
(956) 548-2591

[2] THE COURT: B-12-848, United States of America versus Saul Molina-Martinez.

MR. HAGEN: Bill Hagen for the government. We're ready, Your Honor.

MR. CANTU: Reynaldo Cantu for the defendant.

(Defendant present.)

THE COURT: All right. Where are we, Mr. Cantu?

MR. CANTU: May it please the Court, there's an issue in regard to the underlying burglary of a habitation on this case that I'm just not satisfied with what I've done so far. I'd like 30 days so that I can continue in regard to being able to present something to the Court.

MR. HAGEN: No objection.

THE COURT: All right. Mr. Molina, do you have any objection to me postponing this?

THE DEFENDANT: I'm sorry?

THE COURT: He can't hear.

THE INTERPRETER: It's too loud.

THE COURT: Can you hear now? There's a squeak. I can hear it.

THE DEFENDANT: No.

THE COURT: All right. Is there any reason I can't go ahead and adopt the report and recommendation?

MR. CANTU: No, Your Honor.

MR. HAGEN: No objection.

[3] *(Defendant sworn.)*

THE COURT: All right. Counsel, Mr. Molina pled guilty to Judge Recio. Is there any objection to me adopting that report and recommendation?

MR. HAGEN: No objection, Your Honor.

MR. CANTU: No objection, Your Honor.

THE COURT: Mr. Molina, when you pled guilty, you pled guilty to one of our United States magistrate judges. He's recommended to me that I should accept your guilty plea. Is there any reason why I shouldn't?

THE DEFENDANT: Yes.

MR. CANTU: May I, Your Honor?

THE COURT: Okay.

(Discussion off the record.)

THE COURT: All right. Let me ask the question again.

THE DEFENDANT: Yes.

THE COURT: All right. Mr. Molina, you pled guilty to a different judge. And is there any objection to me adopting that report and recommendation that recommends me to accept the guilty plea?

THE DEFENDANT: No, no problem.

THE COURT: All right. The report and recommendation of the United States Magistrate Judge is hereby adopted. The Court finds the defendant, Saul Molina-Martinez, guilty of the offense of being an alien unlawfully found in the United States after [4] having been convicted of an aggravated felony and deported, in violation of Title 8, United States Code, Section 1326(a) and (b).

All right. I'm going to reset this to March 4th at 8:30.

MR. CANTU: Thank you, Your Honor.

THE COURT: All right.

MR. HAGEN: May I be excused, Your Honor?

THE COURT: You may.

* * *

(End of requested transcript)

-oOo-

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: April 9, 2013

/s/_____
Signature of Court Reporter
Barbara Barnard

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA VS. SAUL MOLINA-MARTINEZ	CRIMINAL ACTION NO. B-12-848

SENTENCING
BEFORE THE HONORABLE ANDREW S. HANEN
MARCH 14, 2013
VOLUME 2

APPEARANCES:

For the Plaintiff:
MR. WILLIAM HAGEN
Assistant United States Attorney
Brownsville, Texas

For the Defendant:
MR. REYNALDO CANTU
Assistant U.S. Public Defender
Brownsville, Texas

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General Order 94-15, United States District Court, Southern District of Texas.

Transcribed by:
BARBARA BARNARD
Official Court Reporter
600 E. Harrison, Box 301
Brownsville, Texas 78520
(956) 548-2591

[6] THE COURT: B-12-848, United States of America versus Saul Molina-Martinez.

MR. HAGEN: Bill Hagen for the government.

(Defendant present.)

MR. CANTU: Reynaldo Cantu for the defendant.

(Defendant sworn.)

THE COURT: All right. Mr. Molina, you've gone over the presentence investigation report with Mr. Cantu?

THE DEFENDANT: Yes.

THE COURT: Mr. Cantu, do we have any objections that are yet to be unresolved [*sic*] ?

MR. CANTU: Yes, Your Honor. This is the case where we're raising the issue that the Tennessee statute and the definition of habitation is broader than the Model Penal Code's definition. And under analysis, it's – it allows someone to be convicted of

conduct that would not meet the criteria of burglary of a habitation.

THE COURT: And that is because?

MR. CANTU: The definition of habitation is overbroad. My initial – and if you remember, Your Honor, my initial objection had to be that – had to do with the fact that it did not have "with intent to commit a theft." But the indictment did have it in there, and there's language in – whatever I did with it. There's language in the case I supplied the Court that cures it.

[7] But my objection goes to the definition of habitation. And I supplied the Court with – well, that's my – that's going to be my objection. Do you want argument on that?

THE COURT: Well, what's the government's position on it?

MR. HAGEN: We're not going to agree. We think that the objection is not well-founded. We think that the 16-level increase is appropriate.

Did Your Honor – would Your Honor like me to elaborate why I think that's appropriate?

THE COURT: Yes, I would.

MR. HAGEN: Let me first offer Government's Exhibit No. 1, which is a copy of the seven prior convictions for aggravated burglary that this defendant has amassed in the last number of years.

Now –

THE COURT: Those will be admitted.

MR. HAGEN: Most of those judgments – I'm sorry. I thought you said admitted. I didn't hear the wait a minute, Your Honor.

THE COURT: No, I did. I said admitted.

MR. CANTU: Then I misheard. I'm sorry.

MR. HAGEN: Most of those judgments have – I think there's one that doesn't have a charging instrument attached to it, but they all make very clear that he entered with the intent [8] to commit a theft. And that was the first objection that was filed by Mr. Cantu, and he wanted to change that objection to a certain degree to suggest that the definition of habitation was overbroad; that the Tennessee statute or that the Tennessee law included things such as dairies and smokehouses that wouldn't normally be included in a generic burglary case today. And he provided some very old cases to the Court and to the government.

The cases that Mr. Cantu relies on, they were produced in 1842 and 1869, long before the invention of the light bulb, refrigeration and indoor toilet, so habitations were very different structures back then than they are today. I don't think one needs to spend any time with these old cases since the definition of habitation has been codified in Tennessee. It can now be found simply by looking at Tennessee Code, Section 3914401 [*sic*].

And the objection that Mr. Cantu is making today is that – concerns appurtenances and other structures besides the dwelling house. And I could not find a Fifth Circuit case that interpreted Tennessee Code 391401 [*sic*], but I did find a Fifth Circuit case that interprets the definition of habitation associated with the Texas Penal Code, Section 3002 [*sic*]. And I provided a copy of *Cardenas-Cardenas* to Mr. Cantu, and I give a copy to the Court.

And I think there's – the guidance that comes from *Cardenas-Cardenas* is dispositive when one compares the [9] definition of habitation in Tennessee with the definition of habitation in Texas because they're absolutely identical. And in *Cardenas-Cardenas* they say that a violation of 3002 [*sic*], the Texas burglary, is a enumerated offense and 16 levels is appropriate. I don't think 16 levels was assessed in *Cardenas-Cardenas*, but it's certainly the enumerated offense of burglary of a dwelling.

And I know that the Court's been provided with the Tennessee statute. I have a copy of the Texas statute. And the only difference is the Texas statute has an A and a B, and the Tennessee statute uses exactly the same language, but it's all included under Sections 1C.

THE COURT: Okay. Mr. Cantu?

MR. CANTU: Thank you, Your Honor.

I liked the government's – when the government gave me the *Cardenas-Cardenas*, they said it didn't

have the patina of my authority on cases. It's a relatively young case compared to my 1842 case.

If you look at the statute habitation, it includes any structure, including a self-propelled vehicle that's designed or adapted for overnight accommodation of persons and actually occupied. But then – and this – its [*sic*] almost the same language as *Armor versus State*, the 1842 case, and includes each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the [10] structure or vehicle.

And the easiest way I can explain it is with an example. You have someone with a recreational vehicle, and they're also towing a trailer where they keep their accordions and matters like that. It's like it's a band, okay? And so I think it's envisioned that if you break into the recreational vehicle, that's burglary of a habitation.

But under the Tennessee statute, the trailer that's attached to the back where nobody is sleeping but it's appurtenant can be counted [*sic*]. And the – if you remember the – I know that I supplied the cases to the Court, but this is *Armor versus State*, December 1842. They're talking about whether or not the dwellings appurtenant to the – to this mansion, this concept of mansion. And then likewise the *Palmer* case, *Palmer versus State*, December 1869, likewise is the same issue.

And so it's the defense position that this is a broader statute, doesn't meet the definition in the

Model Penal Code, and allows someone to be convicted, for example, of, like I said, stealing stuff from the trailer that's hooked up to the back of the recreational vehicle that's occupied by the polka band.

THE COURT: I'm going to overrule the objection. I think it's similar enough to the Texas statute that the Fifth Circuit will interpret it the same way.

Any other objections, Mr. Cantu?

[11] MR. CANTU: No, Your Honor.

THE COURT: Mr. Hagen, what's the government's position regarding sentencing?

MR. HAGEN: Probation has recommended the low end on this case, 77 months. I disagree with that recommendation. I'm asking for a high end sentence of 96 months.

This defendant has been convicted of seven aggravated burglaries. The first batch he was caught committing two aggravated burglaries that were committed in 2001 and 2002, and he was sentenced to three years confinement. After he got out of Tennessee prison, he committed a rash of other burglaries, Your Honor, and he was convicted of burglaries that took place in May of 2010, May of 2009. Actually four of them that he committed in May of 2009. Those are the offenses he was convicted of.

And when one looks at the language described in these offenses, especially in paragraph 26, he's breaking into people's homes. And as paragraph 26 represents, he was – when he was encountered, he was armed with a machete that he drew and ultimately dropped to the ground and fled.

But he's also an individual that has a history of marihuana, ecstasy, methamphetamine, and crack cocaine abuse. These offenses are not old. You know, the most recent one was in May of 2010, and he had an eight year prison sentence that was assigned with those convictions.

[12] And I think it is – I see no reason not to believe that when this defendant gets out of prison that he won't start burglarizing homes again. I think that is his profession. He's a burglar, and I think that he is in all likelihood going to hurt somebody. And to protect the public from this defendant, we're asking that he be confined for 96 months. I think it's unreasonable to believe that he will not return. I think it's unreasonable to believe that he won't continue to engage in criminal behavior given his criminal history.

THE COURT: Mr. Cantu?

MR. CANTU: Well, Your Honor, part of the argument or a major part of the argument is the potential of my client's conduct after he's discharged. The point is that he has excessive – at the same time the government is talking about all of these burglary convictions. No violence was used on any of those

convictions. He did have a machete with him, but that could have been used as a pry bar. The point is he did not use it. He dropped it and fled.

The other part of it is the motivation for the burglaries had to do with the fact that this man was a – was a drug addict and was just supporting his habit, and that's why the rash of burglaries. That's very common. But he never used violence apart from the actual entry of the vehicle.

77 months is a severe sentence. And then after the 77 months, he'll be deported with probably a special release term. [13] That is more than adequate to ensure he doesn't come back again.

THE COURT: Mr. Molina, would you like to address the Court?

THE DEFENDANT: First of all, I want to apologize to you, Your Honor, and the U.S. Attorney and my attorney for placing him in this situation. When I came to the United States, it was in '98. I was working fine, sending money to my family. But in 2001, I started – I became addicted. That's when I had my first felony.

After that I went back to Mexico to complete my college. Over there I graduated as a veterinarian. But since the crime was so strong in Mexico, I came back to the United States. So I started my addiction. I continued committing crimes. This time when I was in prison, I got rehabilitated.

Right now I have a five-year-old daughter and a wife, and they are the reasons why I came back to the United States.

THE COURT: Where are they?

THE DEFENDANT: They live in Tennessee right now.

I ask you to have consideration on me because this time I want to go back to my country and take my family. Now I know that coming to the United States is not for me. And with the education I have, my studies, I know I can make it in Mexico.

I think that's all, Your Honor. And thank you very much for your attention.

THE COURT: All right. Thank you, sir.

[14] All right. The Court adopts the factual findings and guideline applications in the presentence investigation report. It's the judgment of the Court that the defendant, Saul Molina-Martinez, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 77 months. Upon release from imprisonment, Defendant shall be placed on supervised release for a term of three years without supervision.

While on supervised release, Defendant shall not commit another state, federal or local crime, he shall comply with the standard conditions that have been adopted by this Court, abide by any mandatory conditions required by law, and shall comply with the following additional conditions.

Defendant shall not illegally possess a controlled substance and shall refrain from any unlawful use of a controlled substance. Defendant shall not possess a firearm, destructive device, or other dangerous weapon. Defendant is not to reenter the United States illegally, and he shall cooperate in the collection of a DNA sample if it's authorized by statute.

The Court finds the defendant does not have the ability to pay a fine and waives the fine, but does impose the special assessment of $100.

MR. HAGEN: Move to remit that assessment, Your Honor.

THE COURT: All right. That will be granted.

Does he want me to recommend a Tennessee facility?

[15] MR. CANTU: No, Your Honor.

THE COURT: Okay.

THE DEFENDANT: Yes.

MR. CANTU: Yes, he does? Okay. Well –

THE DEFENDANT: I will talk to my attorney about that?

THE COURT: Yes.

MR. CANTU: Thank you.

THE COURT: Okay. So not now?

MR. CANTU: Not now.

THE COURT: Okay. All right.

MR. CANTU: May I be excused, Your Honor?

MR. HAGEN: May I be excused, Your Honor?

THE COURT: You may.

(End of requested transcript)

* * *

-oOo-

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: April 9, 2013

/s/_____
Signature of Court Reporter
Barbara Barnard

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Brownsville

UNITED STATES OF AMERICA

V.

SAUL MOLINA-MARTINEZ

☐ See Additional Aliases.

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: **1:12CR00848-001**

USM NUMBER: 70746-179

Reynaldo S. Cantu, Jr.
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 on October 11, 2012

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendants adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
8 U.S.C. §§ 1326(a) and 1326(b)	Alien Unlawfully Found in the United States After Deportation, Having Been Previously Convicted of an Aggravated Felony	08/31/2012	1

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____
☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 14, 2013
Date of Imposition of Judgment

Andrew Hanen
Signature of Judge

ANDREW S. HANEN
UNITED STATES
DISTRICT JUDGE
Name and Title of Judge

March 22, 2013
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 77 months.

☐ See Additional Imprisonment Terms.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years.
The Court further orders the supervised release term be without supervision.

☐ See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. *(for offenses committed on or after September 13, 1994)*

☐ The above drug testing condition is suspended, based on the court's determination that

the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state registration in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant is not to re-enter the United States illegally.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution), to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

☐ See Additional Restitution Payees.

TOTALS	$	0.00	$	0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine ☐ restitution.

  ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☒ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-40324

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SAUL MOLINA-MARTINEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:12-CR-848-1

(Filed Dec. 17, 2014)

Before STEWART, Chief Judge, and JONES and HIGGINSON, Circuit Judges.

PER CURIAM:*

Saul Molina-Martinez pleaded guilty, without the benefit of a plea agreement, to being illegally present in the United States following deportation, having

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

been convicted of an aggravated felony. 8 U.S.C. §§ 1326(a), (b). The district court sentenced Molina-Martinez to 77 months in prison, at the bottom of the 77 to 96 month Sentencing Guidelines range set forth in the presentence report, and to a three-year term of supervised release. For the first time on appeal, Molina-Martinez argues that the district court erred in calculating his criminal history category, and that the correct Guidelines range should have been 70 to 87 months. Because he did not object on this ground in the district court, we review the claim for plain error. *See United States v. Mudekunye*, 646 F.3d 281, 289 (5th Cir. 2011). Molina-Martinez must show an error that is clear or obvious and that affects his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes such a showing, we have the discretion to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See id.*

Under the Sentencing Guidelines, prior sentences are counted as a single sentence if they were imposed on the same day, unless the "offenses were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)." U.S.S.G. § 4A1.2(a)(2). Molina-Martinez committed four aggravated burglaries in Tennessee in May 2009, and he committed a fifth aggravated burglary and a theft in May 2010. His first arrest for any of these offenses occurred in June 2010. The probation officer imposed a total of nine criminal history points for three of these offenses

pursuant to U.S.S.G. § 4A1.1(a) and two additional points for the uncounted offenses under § 4A1.1(e), resulting in a total of 18 criminal history points and a criminal history category of VI. However, because there was no intervening arrest between the Tennessee burglaries, Molina-Martinez should have received only a total of 12 criminal history points, which results in a criminal history category of V. The correct calculation would have reduced Molina-Martinez's Guidelines range from 77-96 months to 70-87 months. The government concedes this error. Molina-Martinez therefore has shown a plain or obvious error in the criminal history calculation. *See Puckett*, 556 U.S. at 135.

Molina-Martinez has not, however, established that the error affected his substantial rights. Molina-Martinez must "show a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence." *United States v. Garcia-Carrillo*, 749 F.3d 376, 379 (5th Cir. 2014) (internal quotation marks and citation omitted).[1] The district court imposed a prison sentence of 77 months, which is at the bottom of the Guidelines range applied by the court and in the middle of the properly calculated range. "[W]hen the

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[1] Although Molina-Martinez contends that an error in the Guidelines calculations should be considered presumptively prejudicial, he concedes that the issue is foreclosed by our precedent and raises the argument only to preserve it for further review.

correct and incorrect ranges overlap *and the defendant is sentenced within the overlap*, 'we do not assume, in the absence of additional evidence, that the sentence affects a defendant's substantial rights.'" *Mudekunye*, 646 F.3d at 290 (emphasis in original) (quoting *United States v. Blocker*, 612 F.3d 413, 416 (5th Cir. 2010)). Thus, because his sentence fell within both the correct and incorrect Guidelines range, Molina-Martinez acknowledges that our controlling caselaw obliges him to point to "additional evidence" in the record, other than the difference in ranges, to show an effect on his substantial rights. *United States v. Pratt*, 728 F.3d 463, 481-82 (5th Cir. 2013). Record evidence that the Guidelines range was a "primary factor" in sentencing may be sufficient "additional evidence." *Id.* at 482. In *Pratt*, the district court affirmatively stated on the record that it felt a within-Guidelines sentence was appropriate and that it was choosing a sentence in the middle of the Guidelines range; we noted that this was evidence that the Guidelines range was a primary factor in sentencing. *Id.*[2]

Molina-Martinez has not shown additional evidence that the sentence affected his substantial rights. The mere fact that the court sentenced Molina-Martinez to a low-end sentence is insufficient on its own to show that Molina-Martinez would have

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[2] The court noted also in *Pratt* that there was uncertainty whether an overlap existed at all between the Guidelines range utilized and the correct range. *See Pratt*, 728 F.3d at 482.

received a similar low-end sentence had the district court used the correct Guidelines range. *See United States v. Jones*, 596 F.3d 273, 279 (5th Cir. 2010). The district court made no explicit statement suggesting that the Guidelines range was a primary factor in sentencing. Neither the parties' anchoring of their sentencing arguments in the Guidelines nor the district court's refusal to grant the government's request for a high-end sentence of 96 months is "additional evidence" that the sentence affected Molina-Martinez's substantial rights. Accordingly, Molina-Martinez has not established plain error warranting reversal by this court. *See Puckett*, 556 U.S. at 135. The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-40324

D.C. Docket No. 1:12-CR-848-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SAUL MOLINA-MARTINEZ,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Texas, Brownsville

Before STEWART, Chief Judge, and JONES and HIGGINSON, Circuit Judges.

JUDGMENT

(Filed Dec. 17, 2014)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

[SEAL]

Certified as a true copy and issued as the mandate on Jan 08, 2015

Attest: /s/ Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

(ORDER LIST: 576 U.S.)

THURSDAY, OCTOBER 1, 2015

CERTIORARI GRANTED

* * *

14-8913 MOLINA-MARTINEZ, SAUL V.
UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted.

* * *